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No. 10, Original

# In the Supreme Court of the United States

OCTOBER TERM, 1942

EX PARTE KUMEZO KAWATO

*ON PETITION FOR WRIT OF MANDAMUS*

**BRIEF FOR THE UNITED STATES AS AMICUS CURIAE**

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# In the Supreme Court of the United States

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No. 10, ORIGINAL

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*ON PETITION FOR WRIT OF MANDAMUS*

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## BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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### OPINIONS BELOW

The courts below rendered no opinions. Their orders are attached as exhibits to the petition for a writ of mandamus.

### JURISDICTION

The application for leave to file a petition for writ of mandamus was filed on June 2, 1942, and granted on June 8, 1942. The jurisdiction of this Court is based on Section 234 of the Judicial Code (36 Stat. 1156, 28 U. S. C. § 342).

### QUESTION PRESENTED

Whether an enemy subject residing in the United States is entitled to sue in American courts.

## STATUTE INVOLVED

The statutory provisions primarily involved are Sections 2 and 7 (b) of the Trading with the Enemy Act of October 6, 1917, 40 Stat. 411, 50 U. S. C. App. These provisions are set forth at the appropriate point in the Argument.

## STATEMENT

Petitioner is a Japanese alien resident in Los Angeles, California. On December 4, 1940, he was injured while employed on the fishing boat *Rally*. On April 15, 1941, he filed a libel *in rem* against the *Rally* for maintenance, care, and wages. After answer by the owners of the vessel as claimants, the case came on for trial before District Judge Yankwich on January 20, 1942. At the commencement of the trial the owners moved to abate the action on the ground that petitioner was an enemy alien. The District Court granted the motion and refused to hear the case. An application to the Circuit Court of Appeals for the Ninth Circuit for leave to file a petition for mandamus to compel the District Court to try the case was denied. This Court granted petitioner leave to apply for a similar writ and requested the Solicitor General to state his views.

## SUMMARY OF ARGUMENT

A. It has long been held by American and English courts that the ban against suits by enemies does not extend to enemy subjects residing in the

country. This relaxation of the rule is based upon the fact that recoveries by such persons will not benefit the enemy, as well as upon the hardships which would ensue if such persons were deprived of means of protecting their rights.

B. The Trading with the Enemy Act of 1917 provides only that "nothing in this Act shall be deemed to authorize" the prosecution of suits by enemies, and defines "enemy" so as to exclude residents of this country, in the absence of a Presidential proclamation. Whether these provisions are regarded as a substantive regulation, as confirming common law rules, or as merely leaving the common law in effect, the invariable result is that enemy subjects residing in this country are not prohibited from bringing suit.

C. Various other means now exist for protecting the United States against misconduct or misuse of property by enemy subjects residing here. Such persons may be interned or otherwise regulated under the Alien Enemy Act. The President may seize or divest them of their property under Sections 7 (c) and 5 (b) of the Trading with the Enemy Act, as amended. Under the same Act the Treasury has authority to freeze their money and credits and to prohibit transactions necessary to the sending of funds outside the country. Under the existing Treasury regulations, Japanese citizens residing in this country prior to June 17, 1940, are not restricted in the use of their prop-

erty, which would seem to indicate that neither the use nor the recovery of assets by such persons is regarded as harmful to the interests of the United States.

## ARGUMENT

### AN ENEMY SUBJECT RESIDING IN THE UNITED STATES IS ENTITLED TO SUE IN AMERICAN COURTS

#### A. *The Common Law*

The principle that a citizen of an enemy nation is not entitled to sue in our courts has its roots deep in the common law of England. It probably stems both from the original reluctance of the common law to permit any suits by aliens [1] and also from the concept that every subject of an enemy state was to be treated as an enemy of the King and thus not entitled to the benefit of the King's laws.[2] In more modern times, however, the courts have declared the rule to be founded on "public policy, which forbids that the property sued for should be carried out of the country to enrich the enemy."[3]

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[1] Littleton, Sec. 198 (*circa* 1481); 1 Bacon's *Abridgment* (1852 Am. ed.) 210 *et seq.;* McNair, *Alien Enemy Litigants*, 31 Law Quarterly Rev. 154, 155. Coke on Littleton, 129, a, b (1st Am. ed. 1853) notes that this disability (at the time when Coke wrote) extended only to real actions. See also Blackstone, *Commentaries* (Lewis Ed., 1900) 372–373.

[2] 1 Dyer, f. 2, p. 8 (1514); McNair, *supra*, n. 1, at 157.

[3] The common law ban against trading with and suits by enemies assumes that the enemy nation can be assisted only through the actual transfer of property to enemy territory. This oversimplifies the problem, and accordingly, the com-

*Crawford* v. *The William Penn*, 6 Fed. Cas. No. 3372. As stated more generally, the rule is "grounded upon public policy, which forbids the doing of acts that will be or may be to the advantage of the enemy State by increasing its capacity for prolonging hostilities in adding to the credit, money or goods, or other resources available to individuals in the enemy State." *Porter* v. *Freudenberg*, [1915] 1 K. B. 857, 868.

At an early date, the English courts held that this disability did not apply to enemy subjects present in the realm under safe conduct or license of the King, and it has been recognized from the first that a person who came to England in time of peace and remained there quietly and without disturbance would be treated as present under "license."[4] The older decisions explained this exception to the

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mon law is now implemented by legislative restrictions. See pp. 18–22 and p. 11, n. 14, *infra*. As the Senate Committee Report on the Trading with the Enemy Act (S. Rep. 111, p. 2, 65th Cong., 1st Sess.) recites:

> * * * The complexity of modern business demands far greater stringency in certain directions than the old cases decided by the courts provided for. On the other hand, the more enlightened views of the present day as to treatment of enemies makes possible certain relaxations in the old law.

[4] Y. B. 32 Hen. VI, 23 (1454); *Wells* v. *Williams* (1698) 1 Ld. Raym. 282, 1 Salk. 45; 6 Bacon's *Abridgment* (1852 Am. ed.) 556. The English authorities are reviewed in *Porter* v. *Freudenberg*, [1915] 1 K. B. 857, the leading English case, and McNair, *Alien Enemy Litigants*, 31 Law Quarterly Rev. 154, 34 *id.* 134.

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general doctrine on the ground that such a resident enemy was present under the protection of the King, and that "suing is but a consequential right of protection" (6 Bacon's *Abridgment,* (1852 Am. ed.) 556). But undoubtedly, from the beginning, the exception was based on the more hard-headed consideration that recoveries by such persons would not benefit the enemy nation,[5] and on recognition of the unnecessary hardship which would result if such persons were deprived of ac-

[5] For the converse reason, the disability applies to all persons, including our own citizens, residing in the enemy country, inasmuch as the enemy will be aided if property or resources are made available to anyone within its borders. *Porter* v. *Freudenberg*, 1 K. B. [1915] 857; *Krachanake* v. *Acme Manufacturing Co.*, 175 N. C. 435 (1918). Because the disability applies to all persons residing in enemy territory and not even to enemy citizens residing in this country, it is often stated in general terms that residence is the controlling criterion. E. g., *ibid.* Acceptance of any such automatic test may be dangerous, particularly if applied to enemies in neutral countries. Since such persons may or may not be likely to aid the enemy, decision as to them should be based on the facts of each case, not on any generalization which ignores the reasons upon which the rule is based. The cases dealing with enemies in neutral countries are not uniform. Cf. *Russel* v. *Skipwith*, 6 Binn. 241 (Pa. 1814); *Cohn* v. *Gismond & Co.*, 203 N. Y. App. Div. 453 (1922); *Lampel* v. *Berger*, 38 D. L. R. 47 (Ont. 1917); *Newman* v. *Bradshaw*, 33 West. L. Rep. 945 (B. C. 1916); *White Engineering Corp.* v. *Canadian Car and Foundry Co.*, 43 Quebec Pr. 419 (1940); *In re Mary, Duchess of Sutherland*, 31 Times L. Rep. 248, 394, applying dicta in *Janson* v. *Driefontein Consolidated Mines* [1902] A. C. 484, 505; and *Porter* v. *Freudenberg*, [1915] 1 K. B. 857, 868.

cess to the courts as a means of safeguarding their civil rights.

In the earliest and perhaps the leading American case on the subject, *Clarke* v. *Morey*, 10 Johns. 69 (N. Y. 1813), Chief Justice Kent declared that an alien enemy was a lawful resident[6] so long as the President took no action against him under the Alien Enemy Act of 1798 (1 Stat. 577), and that—

> * * * A lawful residence implies protection, and a capacity to sue and be sued. A contrary doctrine would be repugnant to sound policy, no less than to justice and humanity.

Although there has been no decision of this Court on the point,[7] the lower federal courts (including decisions by Justices Washington and Story on

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[6] This does not mean that an enemy subject residing outside of the enemy country is not an enemy. See the opinion of Cardozo, J. in *Techt* v. *Hughes*, 229 N. Y. 222 (1920), certiorari denied, 254 U. S. 643.

[7] This Court has frequently recognized the general disability of enemy aliens (*Caperton* v. *Bowyer*, 14 Wall. 216, 236; *Hanger* v. *Abbott*, 6 Wall. 532, 536–537, 539; *Masterson* v. *Howard*, 18 Wall. 99, 105; *Ex parte Colonna*, 314 U. S. 510), but it has never passed upon the status of those resident in this country. *Ex parte Colonna*, *supra*, involved an action by the Italian ambassador on behalf of the Italian government, and obviously did not fall within that category. The citation in that opinion of *Porter* v. *Freudenberg*, [1915] 1 K. B. 857, would seem, however, to indicate approval of the principles there set forth as to the rights of resident enemy subjects.

circuit)[8] and the state courts[9] have almost uniformly adhered to the view that the disability does not apply to enemy subjects residing in the United States. During the present war, although there has been some divergence of opinion in the trial courts, most courts have come to the same conclusion.[10] In three cases, trial courts which first

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[8] *Crawford* v. *The William Penn*, 6 Fed. Cas. No. 3372 (C. C. D. N. J. 1815); *Society for the Propagation of the Gospel* v. *Wheeler*, 22 Fed. Cas. No. 13,156 (C. C. D. N. H. 1814); *Otteridge* v. *Thompson*, 18 Fed. Cas. No. 10,618 (D. C. 1814); *Speidel* v. *N. Barstow Co.*, 243 Fed. 621 (D. R. I.).

[9] Other leading state cases are *Russel* v. *Skipwith*, 6 Binn. 241 (Pa. 1814); *Arndt-Ober* v. *Metropolitan Opera Co.*, 182 N. Y. App. Div. 513 (1918); *Krachanake* v. *Acme Manufacturing Co.*, 175 N. C. 435 (1918); *Heiler* v. *Goodman's Motor, etc., Co.*, 92 N. J. L. 415 (1918); cf. *Techt* v. *Hughes*, 229 N. Y. 222 (1920), certiorari denied, 254 U. S. 643.

The most complete collection of cases may be found in Sterck & Schuck, *The Right of Resident Alien Enemies to Sue*, 30 Georgetown Law Journal 421 (March 1942). The cases are also collected in Huberich, *Trading with the Enemy* (1918), p. 188, *et seq.;* 3 A. L. R. 341; L. R. A. 1918 B, 189; L. R. A. 1918 E, 809; Ann. Cas. 1917 C, 206; Picciotto, *Alien Enemy Persons, Firms, and Corporations in English Law*, 27 Yale L. J. 167; McNair, *Alien Enemy Litigants*, 31 Law Quarterly Rev. 154 (1915), 34 *id.* 134 (1918).

[10] Cases upholding the right of enemy residents to sue: *Verano* v. *DeAngelis Coal Co., Inc.*, 44 F. Supp. 726 (M. D. Pa.); *Stern v. Ruzicka*, 44 F. Supp. 726 (D. D. C.); *Anastasio* v. *Anastasio*, 44 F. Supp. 725 (D. D. C.); *Uberti* v. *Maiatico*, 44 F. Supp. 724 (D. D. C.); *Matter of Kohn*, C. C. H. War Law Service, par. 9704 (Cal. Super. Ct., Feb. 18,

held the general disability applicable to residents reversed their positions in well considered opinions after the authorities were called to their attention.[11]

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1942); *Kaufman* v. *Eisenberg*, 177 N. Y. Misc. 939 (1942) (Sup. Ct. N. Y. Co.).

Cases in addition to the instant case denying the right of enemy residents to sue: *Bernheimer* v. *Vurpillot*, 42 F. Supp. 830 (E. D. Pa.), appeal argued April 10, 1942 (C. C. A. 3); *Agrusa* v. *Kansas City Public Service Commission*, No. 469,678, C. C. Jackson Co., Mo. (no opinion).

[11] *Verano* v. *DeAngelis Coal Co., Inc.*, 44 F. Supp. 726 (M. D. Pa.); *Anastasio* v. *Anastasio*, 44 F. Supp. 725 (D. D. C.); *Kaufman* v. *Eisenberg*, 177 N. Y. Misc. 939 (1942) (Sup. Ct. N. Y. Co.). In the *Verano* case the court stated (pp. 727–728):

> The plea of "alien enemy" has been regarded with disfavor in England and the United States as a hard and odious plea. * * * Thus it has been said in *Russel* v. *Skipwith*, *supra*, "the rigor of the ancient law has been softened by increased civilization, and the principle has gradually gained ground, that the contracts of individuals ought not to be affected by the quarrels of nations. * * * Although the plaintiff be an enemy, yet if he resides in the country where the suit is brought, under the protection of the government [which is implied from the fact of former residence and the absence of a request to depart], he may support an action."
>
> Moreover, the reason of the more severe early common law rule denying the right to bring an action was that the moneys recovered would be withdrawn by the successful plaintiff and added to the "funds of his native country." *Russel* v. *Skipwith*, *supra*. Legislation having been passed providing for the seizure of property belonging to alien enemies situate within the United States, with licensing restrictions governing their access to it, any judgments which are recovered can be con-

The experience of this country, in the past and during the present war, has demonstrated that the vast majority of those subjects of countries with which we are at war who reside here, are either entirely loyal to our institutions, or at least unwilling to disobey our laws by giving aid to the enemy. To deprive such persons, of whom there are at the present time approximately 1,350,000,[12] of all access to the courts, might subject them to extreme hardship without any compensating benefit to the United States. A law-abiding enemy resident, quite possibly hostile to the enemy regime, who had lawfully performed services, or sold goods, or rented real estate, or loaned money in a purely domestic business transaction, as authorized by general licenses of the Treasury Department, *infra*, pp. 20–21, would be unable to recover from any person who refused to pay him voluntarily. Persons physically injured (as was petitioner here) would be unable to recover, although the injury was caused by the willful, reckless, or negligent act of another. Certainly no national policy requires that American citizens be relieved of their just obligations or the consequences of their misconduct

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trolled to prevent their militating against the United States or giving aid or comfort to the enemy country of which the plaintiff is a subject. * * * The reason for the original rule having ceased, the rule ceases.

[12] This figure is based upon information obtained from the Alien Registration Division of the Department of Justice.

in dealing with such resident enemy aliens.[13] The spirit of justice, upon which our institutions are founded, and the manifest undesirability of forcing innocent persons into want and destitution forbid any such result when not in the least helpful to the effective prosecution of the war.

This does not mean, of course, that the minority of enemy subjects residing here who might be so inclined are free to use the proceeds of judgments recovered in our courts for the benefit of the enemy.[14] Since their rights to sue and trade are derived from the implied license of the President, such permission can be withdrawn to any extent that the President may deem necessary. In addi-

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[13] "The object is not to defeat the alien enemy of his right to recover whatever may be owed to him, nor to shield the citizen from the enforcement of his just obligations, but to obviate the deriving of any advantage by the enemy, directly or indirectly, pending hostilities. * * *". *Weiditschka* v. *Supreme Tent Knights of the Maccabees*, 188 Iowa 183, 191 (1918).

[14] The purpose of the rule disabling enemies from bringing suit is customarily regarded as being achieved if the proceeds of such suits are prevented from being added to the resources of the enemy. This concept may be too narrow at the present time, since the enemy nation might benefit through funds or property available in this country or even through litigation itself, such as patent or injunction suits, apart from any amount recovered. In such circumstances, we assume that, despite the general formula as to residence being the test of an enemy's disability, the common law is sufficiently flexible to permit the courts, on their own initiative, to apply first principles and take whatever action is necessary to terminate proceedings through which the enemy might be helped or this nation harmed.

tion, as is pointed out at greater length below, resident enemy subjects who are suspected of disloyalty to this country and whose actions might be harmful to the best interests of the United States may be interned, and the property of all resident enemies may be taken or subjected to restrictive regulation which will prevent it from being used in a manner injurious to the United States. The measures which have been taken in this direction during the present war are described *infra,* pp. 18–22.

### B. *The Trading With The Enemy Act.*

The Trading With The Enemy Act of October 6, 1917, 40 Stat. 411, 50 U. S. C. Appendix, provides in the third paragraph of Sec. 7 (b):

> Nothing in this Act shall be deemed to authorize the prosecution of any suit or action at law or in equity in any court within the United States by an enemy or ally of enemy prior to the end of the war, except as provided in section ten hereof [which relates to patents]: *Provided, however,* That an enemy or ally of enemy licensed to do business under this Act may prosecute and maintain any such suit or action so far as the same arises solely out of the business transacted within the United States under such license and so long as such license remains in full force and effect: *And provided further,* That an enemy or ally of enemy may defend by counsel any suit in equity or ac-

tion at law which may be brought against him.

Section 2 of the Act defines "enemy" as meaning (1) anyone residing within the territory of or occupied by the enemy, (2) the enemy government or any officer or division thereof, and (3) any other subject or citizen of the enemy nation, wherever resident, as the President, when he finds such action required for the safety of the United States or the successful prosecution of the war, may, by proclamation, include within the definition of "enemy".[15]

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[15] The definition in Section 2 reads as follows (40 Stat. 411):

That the word "enemy," as used herein, shall be deemed to mean, for the purposes of such trading and of this Act—

(a) Any individual, partnership, or other body of individuals, of any nationality, resident within the territory (including that occupied by the military and naval forces) of any nation with which the United States is at war, or resident outside the United States and doing business within such territory, and any corporation incorporated within such territory of any nation with which the United States is at war or incorporated within any country other than the United States and doing business within such territory.

(b) The government of any nation with which the United States is at war, or any political or municipal subdivision thereof, or any officer, official, agent, or agency thereof.

(c) Such other individuals, or body or class of individuals, as may be natives, citizens, or subjects of any nation with which the United States is at war, other than citizens of the United States, wherever resident or wherever doing business, as the President, if

If these provisions should be regarded as substantively prohibiting suits by enemies, the term "enemy" would have the meaning set forth in Section 2. In that case, enemy subjects residing in this country would not be covered, in the absence of a special executive proclamation.[16] The Act thus would have the identical effect as the common law, which permits resident enemies to sue until the President shall withdraw their implied license.[17]

Section 7 (b), however, does not in itself contain any affirmative prohibition against suits by enemies. On the contrary, it provides only that nothing in the Act "shall be deemed to authorize the

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he shall find the safety of the United States or the successful prosecution of the war shall so require, may, by proclamation, include within the term "enemy."

[16] The only such proclamation thus far issued denies access to the courts to enemy subjects or persons acting under the direction of an enemy nation who enter the United States and are charged with sabotage, espionage, hostile or warlike acts, or violation of the laws of war. Executive Proclamation No. 2561, July 2, 1942, 7 Fed. Reg. 5101.

[17] The statutory and common law tests might reach different results in two situations. If the statute governed, the Presidential proclamation extending disability to resident enemy subjects would have to be based on Section 2 (a) of the Trading with the Enemy Act. Presidential revocation of a resident enemy's license implied under the common law would be based upon either his constitutional powers or the powers vested in him by the Alien Enemy Act of 1798, as amended, R. S. § 4067, 40 Stat. 531, 50 U. S. C. § 21. There might also be a difference insofar as the treatment of enemy subjects residing in neutral territory was concerned, depending upon what the common law as to the rights of such persons was deemed to be. See p. 6, n. 5, *supra*.

prosecution" of such suits. This language would seem to indicate that Congress was deliberately refraining from any legislative regulation of the subject, and was seeking merely to make certain that it was understood that the common law remained in effect.[18] The Act has been declared by a number of courts to have "the effect of confirming" the general common law rule.[19] Huberich, whose treatise on *Trading with the Enemy* annotates and analyzes the Trading with the Enemy Act, section by section, declares that (p. 188):

> the Act neither authorizes nor forbids the institution or prosecution of suits or actions at law or in equity, but leaves this to determination according to existing law.[20] * * *

In a review of Huberich's treatise, Mr. Charles Warren, who as Assistant Attorney General was the primary draftsman of the Act, significantly

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[18] The two provisos in the third paragraph of Sec. 7 (c) deal with the right to sue with respect to licensed activities, and the right of enemies to defend suits brought against them, both rights which would have been recognized at common law. See *McVeigh* v. *United States*, 11 Wall. 259; *Crawford* v. *The William Penn*, 6 Fed. Cas. No. 3372 (C. C. D. N. J. 1815); *Porter* v. *Freudenberg* [1915], 1 K. B. at 880.

[19] *Verano* v. *DeAngelis Coal Co.*, 44 F. Supp. 726 (M. D. Pa.); *Uberti* v. *Maiatico*, 44 F. Supp. 724 (D. D. C.); *Anastasio* v. *Anastasio*, 44 F. Supp. 725 (D. D. C.); cf. *Rothbarth* v. *Herzfeld*, 179 N. Y. App. Div. 865, affirmed, 223 N. Y. 578 (1918); *Arndt-Ober* v. *Metropolitan Opera Co.*, 182 N. Y. App. Div. 513 (1918); *Cohn* v. *Gismond & Co.*, 203 N. Y. App. Div. 453 (1922).

[20] Huberich's review of the older authorities shows that under the common law resident enemy aliens are not barred from prosecuting suits (pp. 188–211).

declares (12 American Journal of International Law, 676, 677):

> The Trading with the Enemy Act, of October 6, 1917 * * * was intended to supplement the previous law as developed by judicial decision; in some directions it was designed to change the previous law; but it was *not* designed to codify the whole law upon the subject, and it specifically provided that the common law should govern in all matters not within the scope of its enactment. It left, therefore, many topics to be determined very largely by the common law or by State laws then in force * * *.

The legislative history of the Act contains no specific reference to the paragraph dealing with the right of enemies to sue. But the statements in the Committee Reports as to the general objectives of the Act reflect an understanding that the rights of enemy subjects residing in the United States were not to be diminished. The House Report states (H. Rep. 85, 65th Cong., 1st sess.):[21]

> One leading purpose of the bill is to prevent [sic] the least practicable restriction upon trade carried on in the United States, and therefore law-abiding persons, whether Germans or neutrals, residing within the United States are not affected by the direct operation of the act, unless the conduct of such

[21] The House Report is included as an appendix to the Senate Report (S. Repts. 111, 113, 65th Cong., 1st Sess., p. 10), and for convenience is cited to the page of the Senate Report, which also contains additional helpful material.

> persons is of a character so hostile that they should be brought within the terms of the act by the proclamation of the President.

The Senate Report also includes, as an appendix, a memorandum of cases prepared by Assistant Attorney General Warren, which notes the authorities governing the treatment of alien enemies residing in the United States and England.[22]

There has been no authoritative judicial determination as to whether the Trading with the Enemy Act substantively controls the rights of enemies to sue, serves as a legislative confirmation of the common law, or merely leaves the common law rules standing. Inasmuch as the same conclusion is reached whatever the theory, the courts have not felt compelled to make a choice. The decisions almost always refer both to the statute and to the common law cases, differing only in the emphasis which they give one or the other, and are not too explicit as to the relation of the statute to the common law.[23] In *Ex Parte Colonna,* 314 U. S. 510,

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[22] This memorandum cites as its first authority on the rights of resident enemies, *Clarke* v. *Morey*, 10 Johns. 69 (N. Y. 1813), discussed *supra*, p. 7.

[23] See cases cited in note 19, p. 15 *supra*, and *Kaufman* v. *Eisenberg*, 177 N. Y. Misc. 939 (1942) (Sup. Ct. N. Y. Co.); *Hungarian General Creditbank* v. *Titus*, 182 N. Y. App. Div. 826 (1918); *Krachanake* v. *Acme Manufacturing Co.*, 175 N. C. 435 (1918); *Heiler* v. *Goodman's Motor etc. Co.*, 92 N. J. L. 415 (1918); *Hirlinger* v. *Zander*, 11 Ohio App. 207 (1919); *Rotar* v. *Industrial Commission*, 40 Ohio App. 168 (1931); *Galveston H. & S. A. Ry. Co.* v. *Blankfield*, 211 S. W. 808 (C. C. A. Tex. 1919).

a suit brought on behalf of the Government of Italy and barred under any theory, this Court merely stated that the provision in Section 7 (b) "was inserted in the Act in the light of the principle, recognized by Congress and by this Court, that war suspends the right of enemy plaintiffs to prosecute actions in our courts."

### C. *Present Controls Over Resident Enemy Subjects.*

The other means now available for controlling the activities of resident enemy subjects make it unlikely that the interests of the United States would be injured by permitting such persons to sue. In the first place, the President has the power under the Alien Enemy Act (R. S. 4067, 1 Stat. 577, 50 U. S. C. § 21) to apprehend, restrain, secure, remove, and otherwise regulate the conduct of alien enemies residing in the United States. This power is being exercised to intern any alien enemy suspected of disloyalty or of being likely to aid the enemy. Furthermore, under this statute, proclamations and regulations have been issued requiring resident enemy subjects to carry identification certificates,[24] regulating their travel,[25] and forbidding them access to certain areas.[26]

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[24] Proclamation No. 2537, Jan. 14, 1942, 7 Fed. Reg. 329.

[25] Travel Regulations of Feb. 5, 1942, 7 Fed. Reg. 844.

[26] Prohibited Areas Regulations of Feb. 14, 21, 24, 1942, 7 Fed. Reg. 1084, 1474 and 1476.

The Trading With The Enemy Act, as has been indicated, deliberately omits from the definition of "enemy" persons residing in this country, in the absence of a Presidential proclamation; thus, domestic trade with resident enemies is not forbidden. But under the Act, the Alien Property Custodian has power to seize all enemy property, including claims and choses in action (Sec. 7 (c)),[27] and if the President should so proclaim, such steps could be taken against resident enemies. Furthermore, under Section 5 (b) of the Act, as amended by the First War Powers Act,[28] the President has power to vest in himself any property, or interest therein, of any foreign country or national thereof. Under the same statutory provision, the Treasury Department has the power to immobilize, through freezing orders, the money or credits of such resident enemies and to forbid transactions necessary to the sending of funds outside the country.[29] These orders extend to property in which any national of specified foreign countries, including

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[27] 40 Stat. 411, 50 U. S. C. Appendix, Sec. 7 (c).

[28] Public Law No. 354, 77th Cong., 1st Sess., 50 U. S. C. (Supp. I, 1940 ed.) Appendix, Sec. 5 (b), Executive Order No. 9095, March 11, 1942, 7 Fed. Reg. 1971, as amended by Executive Order No. 9193, July 6, 1942, 7 Fed. Reg. 5207.

[29] Executive Order No. 8389, as amended. This order has been frequently amended. The order in its current form may be found in U. S. Treasury Dept., *Documents Pertaining to Foreign Funds Control* (Mar. 30, 1942), p. 4.

Japan, has an interest, except as specifically licensed by the Treasury Department.

A general license has been granted by the Treasury to all Japanese nationals who have resided in the United States on and since June 17, 1940, subject only to the filing of reports as to the property interests of each Japanese national whose property is valued at $1000 or more (Treasury Department, General License No. 68–A).[30] Such a generally licensed national is to be regarded as if he were not a national of any blocked country, subject only to the requirements as to reports and records, to the right of the Secretary of the Treasury to withdraw the license as to any particular person, and to the over-all prohibition against trade or communication with enemy territory (Treasury Department, General Ruling No. 4, Pars. 7 and 15, and General Ruling No. 11).[31] Since the pleadings in the present record allege that petitioner is a resident of Los Angeles, California, and that he was employed on the fishing boat *Rally* in April 1940, it can reasonably be inferred that he comes within the class of generally licensed Japanese nationals subject to no property restrictions other than the necessity of filing a report if the value of his property exceeds $1000.

The issuance of a general license to Japanese nationals residing in the United States before June 17, 1940, is a manifestation of executive policy that

[30] *Id.* at p. 46.
[31] *Id.*, at 14, 18.

this country's interests will not be endangered if such persons are allowed to avail themselves of their assets and funds. The same considerations suggest that, in view of the various other safeguards, the enemy State will not be aided by permitting such persons to have access to our courts in order to protect the property rights which in themselves are in no way restricted. Indeed, such enemy residents are freely permitted to obtain property by ordinary purchase, without litigation; it is unlikely that the enemy would receive greater aid if they are allowed to obtain property to which they have a lawful claim through the institution of legal proceedings.

This Court has recognized that the Trading with the Enemy Act has diminished the need for strict adherence to the common law prohibition against institution of suits by enemies. In *Birge-Forbes Co.* v. *Heye,* 251 U. S. 317, it upheld a decision of a circuit court of appeals allowing suit by a non-resident enemy to proceed to judgment on condition that the sum recovered be paid over to the Alien Property Custodian. The opinion states (251 U. S. at 323):

> * * * There is nothing "mysteriously noxious" (*Coolidge* v. *Inglee,* 13 Massachusetts, 26, 37) in a judgment for an alien enemy. Objection to it in these days goes only so far as it would give aid and comfort to the other side. *Hanger* v. *Abbott,* 6 Wall. 532, 536. *M'Connell* v. *Hector,* 3 B. & P.

> 113, 114. Such aid and comfort were prevented by the provision that the sum recovered should be paid over to the Alien Property Custodian, and the judgment in this respect was correct. * * *

Several other courts have also permitted litigation brought by enemies to continue, subject to the proceeds being kept under the control of the court itself.[32]

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On January 31, 1942, in view of the diversity in lower court decisions at that time, and in order that there might be no misapprehension as to "the right of natives, citizens, or subjects of enemy countries, who are resident in the United States, to institute and prosecute suits in federal or state courts," the Attorney General issued a statement [33] that proclamations issued by the President under the Alien Enemy Act (R. S. 4067, 50 U. S. C. § 21)[34] were not an exercise of his power to expand the definition of "enemy" in the Trading With The Enemy Act, and that—

> Accordingly, it is important to note that no native, citizen, or subject of any nation

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[32] *Weiditschka* v. *Supreme Tent Knights of the Maccabees*, 188 Iowa 183 (1918); *Propper* v. *Buck*, N. Y. Sup. Ct., Feb. 4, 1942, C. C. H. War Law Service, Par. 9706; *White Engineering Corp.* v. *Canadian Car and Foundry Co.*, 43 Quebec Pr. 419 (1940).

[33] See Department of Justice Press Release of January 31, 1942.

[34] See Proclamations Nos. 2525, 2526, 2527, 2563, 6 Fed. Reg. 6321, 6323, 6324, 7 *id.* 5535.

with which the United States is at war and who is resident in the United States is precluded by federal statute or regulations from suing in federal or state courts.

Respectfully submitted,

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JULY, 1942.

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# SUPREME COURT OF THE UNITED STATES.

No. 10, Original.—October Term, 1942.

Ex parte Kumezo Kawato. } On Petition for Writ of Mandamus.

[November 9, 1942.]

Mr. Justice Black delivered the opinion of the Court.

The petitioner, born in Japan, became a resident of the United States in 1905. April 15, 1941, he filed a libel in admiralty against the vessel Rally in the District Court for the Southern District of California. He claimed wages were due him for services as a seaman and fisherman on the Rally, and sought an allowance for maintenance and cure on allegations that he had sustained severe injuries while engaged in the performance of his duties. Claimants of the vessel appeared and filed an answer on grounds not here material, but later, on January 20, 1942, moved to abate the action on the ground that petitioner, by reason of the state of war then existing between Japan and the United States, had become an enemy alien and therefore had no "right to prosecute any action in any court of the United States during the pendency of said war." The District Judge granted the motion. Petitioner sought mandamus in the Circuit Court of Appeals for the Ninth Circuit to compel the District Court to vacate its judgment and proceed to trial of his action, but his motion for leave to file was denied without opinion. We granted leave to file in this Court, 316 U. S. 650, and the cause was submitted on answer, briefs and oral argument.

Although the Court's order of abatement for the duration of the war rested solely on the ground of petitioner's status as an alien enemy, it has been argued here that the writ should be denied because the Court could have dismissed the bill on other grounds, particularly claimed defects in the allegations of the libel. These contentions are irrelevant here. Unless the action was properly abated for the reasons set out in the motion and the Court's order, the petitioner is entitled to have the District Court

proceed with his action and pass upon the sufficiency of his allegations. This is an essential step in an orderly trial leading to a final judgment from which an appeal will lie to correct errors. If the Court's order of abatement was erroneous, mandamus is the appropriate remedy. 28 U. S. C. 342; *McClellan* v. *Carland*, 217 U. S. 268, 279-282; *Ex parte Metropolitan Water Co.*, 220 U. S. 539, 546.

"Alien enemy" as applied to petitioner is at present but the legal definition of his status because he was born in Japan with which we are at war. Nothing in this record indicates, and we cannot assume, that he came to America for any purpose different from that which prompted millions of others to seek our shores—a chance to make his home and work in a free country, governed by just laws, which promise equal protection to all who abide by them. His suit invokes the protection of those laws through our courts both to obtain payment of wages alleged to have been promised him by American citizens for lawful work and reimbursement on account of damages suffered while working for those citizens.

Petitioner contends that he has the right under the common law and treaties to proceed with his action, and that this right is not limited by the statutes. In our view the possibility of treaty rights, which has not been argued extensively, need not be considered. Applicable treaties are ambiguous and should not be interpreted without more care than is necessary in this case.[1]

There doubtless was a time when the common law of England would have supported dismissal of petitioner's action, but that time has long since passed. A number of early English decisions, based on a group concept which made little difference between friends and enemies barred all aliens from the courts. This rule

[1] Petitioner argues that his case is covered by article 23 h of the Annex to the IVth Hague Convention of 1907: "It is especially prohibited . . . to declare abolished, suspended, or inadmissible in a Court of law the rights and action of the nationals of the hostile party." This clause, which was added to the Convention of 1899 without substantial discussion either by the Delegates in General Assembly or by the committee and sub-committee which dealt with it, III Proceedings of the Hague Convention of 1907, 12, 107, 136, 240; and I *ibid.* 83, was construed by an English Court to apply solely in enemy areas occupied by a belligerent. Porter *v.* Freudenberg, [1915] 1 K. B. 857. The question has not been raised in the courts in this country, but the English interpretation was repeated with approval by Representative Montague of the Interstate Commerce Committee in his address to the House when he presented to it the Trading With the Enemy Act. 55 Cong. Rec. 4842 (1917).

was gradually relaxed as to friendly aliens[2] until finally in *Wells* v. *Williams*, 1 Ld. Raym. 282 (1698), the Court put the necessities of trade ahead of whatever advantages had been imagined to exist in the old rule, and held that enemy aliens in England under license from the Crown might proceed in the courts. As applied ever since, alien enemies residing in England have been permitted to maintain actions, while those in the land of the enemy were not; and this modern, humane principle has been applied even when the alien was interned as is petitioner here.[3] *Schaffenius* v. *Goldberg*, [1916] 1 K. B. 284.

The original English common law rule, long ago abandoned there, was, from the beginning, objectionable here. The policy of severity toward alien enemies was clearly impossible for a country whose life blood came from an immigrant stream. In the war of 1812, for example, many persons born in England fought on the American side.[4] Harshness toward immigrants was inconsistent with that national knowledge, present then as now, of the contributions made in peace and war by the millions of immigrants who have learned to love the country of their adoption more than the country of their birth. Hence in 1813 Chief Justice Kent, in *Clarke* v. *Morey*, 10 Johns. 69, 72, set the legal pattern which, with sporadic exceptions, has since been followed.[5] The core of that decision he put in these

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[2] According to Littleton, an alien might not sue in either a real or personal action; but this rule was modified by Coke to bar such actions only by alien enemies and to permit personal actions by alien friends. See Coke on Littleton 129 b. Pollock and Maitland suggest that this modification by Coke was "a bold treatment of a carefully worded text." 1 History of English Law, 2d ed., 459. The early law treated all aliens as a group. See the sub-titles of Pollock and Maitland's chapter, "The Sorts and Conditions of Men", some of which are: The Knights, The Unfree, The Clergy, Aliens, The Jews, Women, etc. *Ibid.*, Chap. II. For a summary of English views now largely obsolete on alien standing in court see Hansard, Law Relating to Aliens, chap. 7 (1844). For a survey of the common law on inheritance of land by aliens see Techt v. Hughes, 229 N. Y. 222 (Cardozo, J.).

[3] Petitioner was interned some months after the court had abated his action. The government has filed a supplemental brief stating that it does not consider that this circumstance alters the position of petitioner in respect to his privilege of access to the courts.

[4] One writer estimates that half of the 400 men on board the Constitution when it captured the Guerriere were seamen who had deserted the British, and the ship United States was reported by its captain have no men on board who had not served with British war ships. Bradley, The United Empire Loyalists, 192; and see 3 McMaster, History of the United States, 242.

[5] For collection of cases see 30 Georgetown L. J. 421; 28 Virginia L. R. 429; 27 Yale L. J. 105; Huberich, Trading With The Enemy, 188 *et seq.*; Daimler

words: "A lawful residence implies protection, and a capacity to sue and be sued. A contrary doctrine would be repugnant to sound policy, no less than to justice and humanity."[6] Thus the courts aligned their policy with that enjoined upon the President by Congress in 1812 when it directed him to administer the laws controlling aliens in a manner that would be "consistent with the public safety, and according to the dictates of humanity and national hospitality." 50 U. S. C. § 22.

In asking that the rights of resident aliens be abrogated in their behalf, private litigants in effect seek to stand in the position of government. But only the government, and not the private individual, is vested with the power to protect all the people, including loyal aliens, from possible injury by disloyal aliens. If the public welfare demands that this alien shall not receive compensation for his work or payment for his injuries received in the course of his employment, the government can make the decision without allowing a windfall to these claimants. Even if petitioner were a nonresident enemy alien, it might be more appropriate to release the amount of his claim to the Alien Property Custodian rather than to the claimants; and this is precisely what was done in *Birge-Forbes Co.* v. *Heye*, 251 U. S. 317, 323, in which this Court said that the sole objection to giving judgment for an alien enemy "goes only so far as it would give aid and comfort to the other side." The ancient rule against suits by resident alien enemies has survived only so far as necessary to prevent use of the courts to accomplish a purpose which might hamper our own war efforts or give aid to the enemy. This may be taken as the sound principle of the common law today.

It is argued that the petitioner is barred from the courts by the Trading With the Enemy Act, 50 U. S. C. Appendix. The particular clause relied on is Sec. 7: "Nothing in this Act shall be deemed to authorize the prosecution of any suit or action at law or in equity in any court within the United States by an

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*v.* Continental Tyre Co., Anno. Cas. 1917 C, 170, 204; In the Matter of Bernheimer, C. C. A. 3rd, — F. 2d —; and for English cases, McNair, Legal Effects of War.

[6] Story was one of the few commentators to approve any part of the early common law rule. He accepted so much of that doctrine as required enemy aliens entitled to relief in the courts to have entered the country under safe conduct or license. Story on Civil Pleadings, p. 10; Story's Equity Pleadings, Sec. 51-54, and particularly Sec. 724. This requirement was reduced to legal fiction in Clarke *v.* Morey, *supra*, at 72, when Chief Justice Kent held that "The license is implied by law and the usage of nations."

enemy or ally of enemy prior to the end of the war, except as provided in Section 10 hereof, [which relates to patents]; . . ." Analysis of its terms makes clear that this section was not meant to apply to petitioner, and an examination of its legislative history makes this doubly certain. Section 7 bars from the courts only an "enemy or ally of enemy." Section 2 of the Act defines the "alien enemy" to which the Act applies as those residing within the territory owned or occupied by the enemy; the enemy government or its officers,[7] or citizens of an enemy nation, wherever residing, as the President by proclamation may include within the definition. Since the President has not under this Act[8] made any declaration as to enemy aliens, the Act does not bar petitioner from maintaining his suit.

This interpretation, compelled by the words of the Act, is wholly in accord with its general scope, for the Trading With the Enemy Act was never intended, without Presidential proclamation, to affect resident aliens at all. Prior to the passage of the Act, the courts had consistently held that during a state of war, commercial intercourse between our nationals and non-resident alien enemies, unless specifically authorized by Congress and the Executive, was absolutely prohibited, and that contracts made in such intercourse were void and unenforceable.[9] This strict barrier could be relaxed only by Congressional direction, and therefore the Act was passed with its declared purpose "to mitigate the rules of law which prohibit all intercourse between the citizens of warring nations, and to permit under careful safeguards and restrictions, certain kinds of business to be carried

[7] Some possible confusion on the part of the Court below and of other courts may have developed from our per curiam opinion in Ex parte Colonna, 314 U. S. 510, in which leave to file a petition for writs of prohibition and mandamus in connection with a proceeding brought in behalf of the Italian government was denied on the basis of the Trading With the Enemy Act. That opinion emphasized that an enemy government was included within the definition of the classification "enemy" as used in that act, and that such enemy plaintiffs had no right to prosecute actions in our courts. The decision has no bearing on the rights of resident enemy aliens. The Colonna decision was momentarily misapplied in Kaufman *v.* Eisenberg, 177 N. Y. Misc. 939, but the trial judge corrected a stay in proceedings he had previously allowed upon his further consideration of the fact that the plaintiff was a resident alien.

[8] The President has issued a Proclamation taking certain steps with reference to alien enemies under the Alien Enemy Act of 1798 as amended, 50 U. S. C. § 21, but this Proclamation has no bearing on the power of the President under the Trading With the Enemy Act.

[9] Report of the Senate Committee on Commerce, Report No. 111, 65th Cong., 1st Sess., pages 15-22. Coppell *v.* Hall, 7 Wall. 542, 554, 557, 558.

on."[10] Thus Congress expressly recognized by the passage of the Act that "the more enlightened views of the present day as to treatment of enemies makes possible certain relaxations in the old law."[11]

Since the purpose of the bill was to permit certain relations with non-resident alien enemies, there is no frustration of its purpose in permitting resident aliens to sue in our courts. Statements made on the floor of the House of Representatives by the sponsor of the bill make this interpretation conclusive.[12]

Not only has the President not seen fit to use the authority possessed by him under the Trading With the Enemy Act to exclude resident aliens from the Courts, but his administration has adopted precisely the opposite program. The Attorney General is primarily responsible for the administration of alien affairs. He has construed the existing statutes and proclamations as not barring this petitioner from our courts,[13] and this stand is emphasized by the government's appearance in behalf of petitioner in this case.[14]

The consequence of this legislative and administrative policy is a clear authorization to resident enemy aliens to proceed in all

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10 Report of the Senate Committee on Commerce, Report No. 111, 65th Cong., 1st Sess., 1.

11 Report of the Senate Committee on Commerce, Report No. 111, 65th Cong., 1st Sess., 2.

12 "Mr. Montague: A German resident in the United States is not an enemy under the bill, unless he should be so declared subsequently by the proclamation of the President, in which case he would have no standing in court." . . .

"Mr. Stafford: Do I understand that this bill confers upon the President any authority to grant to an alien subject doing business in this country the right to sue in the courts to enforce his contract?

"Mr. Montague: If he is a resident of this country, he has the right under this bill without the proclamation of the President.

"Mr. Stafford: If so, where is that authority?

"Mr. Montague: In the very terms of the bill defining an enemy, whereby German residents in the United States have all rights in this respect of native-born citizens, unless these rights be recalled by the proclamation of the President for hostile conduct on the part of the Germans resident in the United States." 55 Cong. Rec. 4842, 4843 (1917).

13 "No native, citizen, or subject of any nation with which the United States is at war and who is resident in the United States is prevented by federal statute or regulation from suing in federal or state courts." Dept. of Justice press release, Jan. 31, 1942.

14 The determination by Congress and the Executive not to interfere with the rights of resident enemy aliens to proceed in the courts marks a choice of remedies rather than a waiver of protection. The government has an elaborate

courts until administrative or legislative action is taken to exclude them. Were this not true, contractual promises made to them by individuals, as well as promises held out to them under our laws, would become no more than teasing illusions. The doors of our courts have not been shut to peaceable law-abiding aliens seeking to enforce rights growing out of legal occupations. Let the writ issue.

A true copy.

Test:

*Clerk, Supreme Court, U. S.*

protective program. Under the Alien Enemy Act, 50 U. S. C. § 21, the President has ordered the internment of aliens, has instituted a system of identification, and has regulated travel. Under the First War Powers Act, 50 U. S. C. Supp. I, 1940 ed. Appendix, Sec. 5(b), and various executive orders he has controlled the funds of resident enemy aliens. Many other statutes make a composite pattern which Congress has apparently thought adequate for the control of this problem. See, e. g., the controls on alien ownership of land in the territories, 8 U. S. C. Chap. 5.